No. 13-35818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC MARITIME ASSOCIATION,

Plaintiff - Appellee,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant - Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
Case No. 3-12-cv-02179-MO

REPLY BRIEF FOR DEFENDANT - APPELLANT NATIONAL LABOR RELATIONS BOARD

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

MARGERY E. LIEBER
Associate General Counsel

NANCY E. KESSLER PLATT
Deputy Assistant General Counsel

KEVIN P. FLANAGAN
Supervisory Attorney

DENISE F. MEINERS
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2930

NATIONAL LABOR RELATIONS BOARD

TABLE OF CONTENTS

Page(s)

INTRODUCTION……………………………….…………….…..…………………1

ARGUMENT …………………………………………..………………….………2

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW AND VACATE THE BOARD'S INTERLOCUTORY SECTION 10(k) DECISION UNDER *LEEDOM v.KYNE* ……………….....2

A. *Leedom* Does Not Supply Jurisdiction Here Because PMA Has Not Shown That It Has Been Wholly Deprived of a Meaningful And Adequate Opportunity To Challenge the Section 10(k) Decision……………………………………..…….2

B. There Is No Clear and Strong Showing That the Board Violated a Clear Statutory Mandate..……………….……….….…..……8

C. PMA's Additional Arguments Lack Merit…………………………..….…10

II. IF THE COURT CONCLUDES THAT THIS APPEAL IS IMPACTED BY *NOEL CANNING*, THE COURT SHOULD STILL VACATE THE DISTRICT COURT'S JUDGMENT……………………………………..………..…………..13

CONCLUSION…………….………………………………………….…..……...16

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Abogados v. AT&T, Inc.,
223 F.3d 932 (9th Cir. 2000) 11

AMERCO v. NLRB,
458 F.3d 883 (9th Cir. 2006) 2, 3

Arrington v. Daniels,
516 F.3d 1106 (9th Cir. 2008) 12

Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.,
502 U.S. 32 (1991) 4,6

Carey v. Westinghouse Corp.,
375 U.S. 261 (1964)....................7

Chicago Truck Drivers v. NLRB,
599 F.2d 816 (7th Cir. 1979) 10

Detroit Newspaper Agency v. NLRB,
286 F.3d 391 (6th Cir. 2002) 4,7

Grutka v. Barbour,
549 F.2d 5 (7th Cir. 1977), *cert. denied*, 431 U.S. 908 (1977)....................9

Leedom v. Kyne,
358 U.S. 184 (1958)....................passim

Local 1545, United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Vincent,
286 F.2d 127 (2d Cir. 1960) 9,10

May Dep't Store v. Graphic Process Co.,
637 F.2d 1211 (9th Cir. 1980) 11

NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.,
488 F.3d 1065 (9th Cir. 2007) 15

Cases-Cont'd **Page(s)**

National Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel,
437 F.3d 1256 (D.C. Cir. 2006)..10

Nat'l Maritime Union v. NLRB,
375 F. Supp. 421 (E. D. Pa.), aff'd, 506 F.2d 1052 (3d Cir. 1974) 8

Newport News Shipbuilding & Dry Dock Co. v. NLRB,
633 F.2d 1079 (4th Cir. 1980) 8

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979)..9

NLRB v. ILWU, Local 50,
504 F.2d 1209 (9th Cir. 1974) 3

NLRB v. Noel Canning,
134 S. Ct. 2550 (2014), *affirming on other grounds*
705 F.3d 490 (D.C. Cir. 2013)…………………………………….... 2,13, 14

Norfolk S. Ry. Co. v. Solis,
915 F. Supp.2d 32 (D.D.C. 2013)...6

Railway Labor Executives' Ass'n v. National Mediation Board,
29 F.3d 655 (D.C. Cir. 1994)...7

Schwarz Partners Packaging, LLC v. NLRB,
- F. Supp.2d -, 2014 WL 294622 (D.D.C. Jan. 28, 2014) 7

SEC v. Chenery Corp.,
332 U.S. 194 (1947)...12

Staacke v. United States Secretary of Labor,
841 F.2d 278 (9th Cir. 1988) 8, 10

Switchmen's Union v. National Mediation Board,
320 U.S. 297 (1943)...5

Cases-Cont'd **Page(s)**

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 15

United States v. Pallares-Galan,
359 F.3d 1088 (9th Cir. 2004) 10

Weissburg v. Lancaster Sch. Dist.,
591 F.3d 1255 (9th Cir. 2010) 11

Yee v. City of Escondido,
503 U.S. 519 (1992)..11

Statutes **Page(s)**

29 U.S.C. § 158(b)(4)(D) (Section 8(b)(4)(D))……………………..……..…..passim

29 U.S.C. § 160(f) (Section 10(f)) …………………………………...…….4,6,9

29 U.S.C. § 160(k) (Section 10(k))………………………..…………...….passim

5 U.S.C. § 706(2)(A) (Section 706(2)(A))…..………...……….……………...12

28 U.S.C. § 2106..…………………………………………………………...15

Rules **Page(s)**

Fed. R. Civ. P. 8(c)(1) 12

INTRODUCTION

Appellant National Labor Relations Board ("NLRB") respectfully files this Reply Brief in response to the Answering Brief filed by Appellee Pacific Maritime Association ("PMA").

The parties do not dispute that the issue presented in this appeal is the propriety of the District Court's assertion of jurisdiction to review and vacate the Board's interlocutory Section 10(k) Decision pursuant the narrow *Leedom v. Kyne*[1] exception to the rule that such decisions are not subject to direct review. The Board's position is that the District Court below erroneously asserted jurisdiction under *Leedom*'s conjunctive, two-part test. First, the District Court erred in concluding that PMA has no adequate alternative means within its control to obtain review of the Section 10(k) Decision, particularly in light of the pending unfair labor practice proceeding that was ongoing at the time PMA brought this suit. On that basis alone, this Court should reverse the District Court's findings and judgment and conclude that the exercise of extraordinary *Leedom* jurisdiction was erroneous. Second, the Board submits that the District Court erred in finding that the Board violated a clear statutory mandate, the other *Leedom* requirement, because there can be no "strong and clear" demonstration of such a violation where there is no mandatory language in the National Labor Relations Act ("Act")

[1] 358 U.S. 184 (1958).

addressing whether the Board can hear and determine a jurisdictional dispute in these circumstances. This Court should therefore reverse for this reason as well.

Finally, during the pendency of this appeal, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *affirming on other grounds* 705 F.3d 490 (D.C. Cir. 2013) ("*Noel Canning*"), which PMA had urged as an alternative basis for affirmance in anticipation of that decision. *Noel Canning* does not impact this case. If this Court concludes otherwise, however, the Board submits that the proper relief is not to affirm the District Court on these grounds, but to vacate the oral findings and judgment below to ensure that the Board will not be precluded from hearing and determining the Section 10(k) matter with a properly-constituted Board, and that the Board is not deprived of the opportunity to obtain reversal of the District Court's oral findings and judgment below.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW AND VACATE THE BOARD'S INTERLOCUTORY SECTION 10(k) DECISION UNDER *LEEDOM v. KYNE*

A. *Leedom* Does Not Supply Jurisdiction Here Because PMA Has Not Shown that It Has Been Wholly Deprived of a Meaningful and Adequate Opportunity to Challenge the Section 10(k) Decision

In *AMERCO v. NLRB*, 458 F.3d 883, 890 (9th Cir. 2006), this Court pointedly refused to make the unwarranted "analytical leap" of extending *Leedom*

jurisdiction "from situations in which judicial review is not available *at all* to situations in which judicial review simply is not available yet." Notwithstanding this clear guidance, the District Court has done precisely what this Court refused to do in *AMERCO*. Because judicial review of the challenged Section 10(k) decision may occur upon the issuance of a final Board order in the related Section 8(b)(4)(D) unfair labor practice case with which the Section 10(k) Decision is "inextricably tied," *NLRB v. ILWU, Local 50*, 504 F.2d 1209, 1212 (9th Cir. 1974),[2] this situation falls squarely into the second category of situations described by *AMERCO*. Therefore, the District Court lacked subject-matter jurisdiction over this case.

PMA insists that *Leedom* supplies jurisdiction in this case even though the propriety of the interlocutory Section 10(k) decision is central to the pending unfair labor practice case. The basis for PMA's position is that future judicial review of the Section 8(b)(4)(D) case is not within PMA's control, and therefore, not completely assured. (Ans. Br. 38-40, 42, 44).

---

[2] As the Board has explained, the Section 10(k) Decision is tied to the unfair labor practice case because there, the International Longshore and Warehouse Union, Local 8 ("ILWU") is alleged to have violated Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), for, among other things, refusing to abide by the Section 10(k) Decision. *See* Br. at 9.

References to "Br." are to the Board's opening brief filed April 2, 2014. References to "Ans. Br." are to PMA's answering brief filed May 30, 2014.

But nothing in *Leedom* or its progeny permits district courts to exercise extraordinary circumstances jurisdiction simply because a plaintiff can imagine hypothetical scenarios in which judicial review does not occur. In *Board of Governors of the Federal Reserve System v. MCorp Fin., Inc.*, the Supreme Court clarified that "central to our decision in [*Leedom*] was the fact that the Board's interpretation of the Act would *wholly deprive* the union of a meaningful and adequate means of vindicating its statutory rights" because there was *no* scheme in place for judicial review of the Board's action. 502 U.S. 32, 43 (1991) (emphasis added); *see also AMERCO*, 458 F.3d at 889 (quoting this portion of the *MCorp* decision). Parties challenging rulings of the NLRB are not "wholly deprived" of their "statutory rights" if, as here, they may "raise their arguments in the court of appeals under [29 U.S.C.] § 160(f)" after the Board issues a final order. *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397 (6th Cir. 2002).

As the Board has explained (Br. at 28-29), district court jurisdiction existed in *Leedom* because there were no parallel unfair labor practice proceedings (either ongoing or reasonably imminent) through which the professional employees could obtain review of the denial of their statutory right to vote whether to be included in a bargaining unit with non-professionals. Since neither the employer nor the union was refusing to bargain after the Board certified the union there as representative of the commingled unit, the Supreme Court found that, absent district court

jurisdiction, the professional employees would have been left without *any* means to vindicate their rights. In reaching this conclusion, the Court cited to two earlier cases in which extraordinary review was found to be justified, noting that in those cases "it was *apparent* that but for the general jurisdiction of the federal courts there would be *no remedy* to enforce the statutory commands which Congress had written into the Railway Labor Act." *Id.* at 190 (quoting *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943)) (emphasis added).

Here, by contrast, it is hardly "apparent" that PMA will be left with "no remedy." *Id.* To the contrary, a Section 8(b)(4)(D) unfair labor practice case involving the very Section 10(k) Decision PMA challenges here *was already underway* at the time PMA brought this lawsuit.[3] PMA's decision not to avail itself of an option it had -- to seek to intervene in that proceeding, which is the only proper vehicle for judicial review of the Section 10(k) decision -- and instead to prematurely seek District Court review, cannot be equated to the helpless position

[3] Contrary to PMA's contention (Ans. Br. at 46), *Leedom* jurisdiction is not supported by the fact that pending this appeal, the Board stayed its further consideration of the Section 8(b)(4)(D) portion of the unfair labor practice case. The Board took this action in response to the District Court's judgment vacating the Board's Section 10(k) Decision. That judgment, while it stands, effectively precludes the Board from processing the Section 8(b)(4)(D) allegation. If this Court reverses or vacates the District Court's oral findings and judgment, the Board will be able to continue processing the proceedings in that case.

occupied by the professional employees in *Leedom*. (Ans. Br. 39-40).[4] The District Court erred in concluding otherwise.

The availability of this avenue for review in this case means that PMA has not been "wholly deprive[d] . . . of a meaningful and adequate means of vindicating its statutory rights." *MCorp*, 502 U.S. at 43. Therefore, the District Court's exercise of review jurisdiction under *Leedom* review was inappropriate, notwithstanding PMA's purported fear that judicial review is not presently guaranteed. *See Norfolk S. Ry. Co. v. Solis*, 915 F.Supp.2d 32, 45 & n.8 (D.D.C. 2013) ("[W]hile NSR may never get the opportunity to challenge the ABR decision before the court of appeals in [this] case, it would still have the opportunity to challenge the ABR decision's interpretation of the statute in another case. NSR may lack clarity of the fate of its claimed statutory rights at this time,

[4] Particularly in light of PMA's self-avowed duty to "participate . . . in any legal proceeding" to protect ILWU's contractual entitlement to perform certain work, (Ans. Br. at 5), PMA's refusal to attempt to intervene in the Section 8(b)(4)(D) unfair labor practice case at any time before or after it filed this lawsuit is a significant reason why this case is unlike *Leedom*. Further, there is no merit to PMA's claim that intervenor status in the unfair labor practice case is a "red herring" because "PMA would remain at the mercy of the parties and the Board as to whether a final order ultimately will issue." (Ans. Br. at 47-48). After intervening, PMA would not be "at the mercy of the parties;" instead, it would *become* a party with the ability to participate in any settlement or to seek judicial review. In any event, Section 10(f) of the Act permits "any person aggrieved" by a final Board order to seek judicial review. 29 U.S.C. § 160(f). As the District Court properly recognized (ER I 17:4-17:7, 43:13, 24-25-44:42:4), if PMA is indeed aggrieved at the conclusion of the unfair labor practice case upon issuance of a final order, it need not become a formal party to the Section 8(b)(4)(D) case in order to preserve its opportunity for judicial review of the Section 10(k) Decision.

but that does not render it 'wholly deprived' such that the *Leedom* doctrine would be appropriate.").[5] Since PMA has failed to satisfy this requirement, the Court need not reach the second conjunctive *Leedom* requirement, and should vacate the District Court's judgment and oral ruling with directions to dismiss PMA's complaint. *Detroit Newspaper Agency*, 286 F.3d at 401.[6]

---

[5] PMA's wholesale reliance on *Railway Labor Executives' Ass'n v. National Mediation Board* ("*RLEA*"), 29 F.3d 655 (D.C. Cir. 1994) (en banc) (Ans. Br. at 17, 18, 24, 31-32, 34) is misplaced. The decisions of the National Mediation Board (NMB) on representation issues are "committed exclusively to the NMB and [are] not judicially reviewable." *Id.* at 661 (citation omitted). Thus, in *RLEA*, the plaintiff labor organizations had no other statutory means of challenging the NMB's new representation procedures as exceeding the authority conferred on the NMB by Congress. *RLEA* is far different from the instant case, where the Section 10(k) Decision is subject to review upon the issuance of a final Board order in the Section 8(b)(4)(D) case. This difference was recognized in *Schwarz Partners Packaging, LLC v. NLRB*, - F.Supp.2d -, 2014 WL 294622 (D.D.C. Jan. 28, 2014), in which the court held that cases under the Railway Labor Act are "unpersuasive" when applied to the NLRA. *Id.* at *9. In that case, the court noted that there was no avenue for judicial review in the *RLEA* case other than through *Leedom:* "Thus, the *RLEA* court, in finding *Leedom* jurisdiction where there was no other avenue to obtain judicial review, undercuts the plaintiff's position that such jurisdiction is appropriate here where an alternative method of judicial review is readily available." *Id.* at *10.

[6] The fact that the Section 10(k) Decision has blocked PMA's efforts to enforce certain arbitration awards in a separate district court action does not justify the exercise of *Leedom* jurisdiction in this case (Ans. Br. at 14-15). Enforcement of those arbitration awards is merely stayed at this time, and if in the normal course of review, the Section 10(k) Decision is ultimately invalidated, it will have no impact in that action. By contrast, if the Section 10(k) Decision is upheld, it will "take precedence" over any contractual obligations, as PMA itself recognizes (Ans. Br. at 15). *See Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964). Either way, the Board's Section 10(k) Decision is appropriately subject to review through the

B. There is No Clear and Strong Showing That the Board Violated a Clear Statutory Mandate

Should this Court consider the second *Leedom* requirement, which obligates PMA to make a "strong and clear" demonstration that the Board acted outside of its delegated powers and contrary to a clear statutory command, *see Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 633 F.2d 1079, 1081 (4th Cir. 1980), it should conclude that PMA failed to satisfy its burden here as well.

PMA asserts that the Board's Section 10(k) Decision is not authorized by the Act's plain statutory language, and urges this Court to accept what the District Court found was the correct interpretation of the Board's authority under Section 10(k) and Section 8(b)(4)(D) (Ans. Br. at 18-24). However, *Leedom* requires this Court not to decide whose interpretation of the Act is correct, or better, but rather, to narrowly determine "whether the statute in question contains a clear command that the [agency] has transgressed." *Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 282 (9th Cir. 1988); s*ee also Nat'l Mar. Union v. NLRB*, 375 F. Supp. 421, 434 (E.D. Pa.) (interpreting *Leedom* to mean that "disagreement with the Board on a matter of policy or statutory interpretation is not a sufficient basis for assertion of jurisdiction"), *aff'd*, 506 F.2d 1052 (3d Cir. 1974).

---

statutory course that Congress set forth, not through the extraordinary exercise of *Leedom* jurisdiction.

Contrary to PMA's interpretation, the Act contains no "clear command" that applies to the circumstances of this case.[7] The Act neither requires nor prohibits a Section 10(k) hearing and decision where a statutory employer in a jurisdictional dispute is threatened about the assignment of work and one group of employees claiming the disputed work is directly employed by a public employer.[8] Accordingly, in the absence of language precluding the application of Section

---

[7] Undermining the provision's clarity, as the Board has pointed out (Br. at 46), neither PMA nor the ILWU initially claimed prior to or during the Section 10(k) evidentiary hearing that the Board did not have authority to determine the dispute. When PMA moved to intervene at the 10(k) hearing, it did not move to quash the notice of hearing (contrary to its assertion here (Ans. Br. at 8)); rather, PMA represented that it "has and wishes to present evidence relevant to the factors the Board may use in *making the determination of the dispute*." (ER II 153 (emphasis added).) This suggests that the statutory language is not so "strong and clear" as to warrant extraordinary district court review, and that resolution of the public/private employee issue here should be one for the Board in the first instance and ultimately, for a circuit court under the normal review provisions of Section 10(f) of the NLRA, not by the District Court in the first instance or this Court on appeal.

[8] As the Board previously noted, even if the Board is found to be wrong on this issue, that does not justify *Leedom* jurisdiction. *See, e.g., Local 1545, United Bhd. of Carpenters & Joiners of Am. v. Vincent*, 286 F.2d 127, 133 (2d Cir. 1960) ("*Vincent*") ("[W]e think the most the appellant has shown is a possible excess of zeal by the Board in reading the will of Congress and consequent use of an erroneous standard" in withdrawing the protection of its contract-bar rule; there was no violation of a 'clear statutory command' or, indeed, as we read § 8(e), of any command at all."); *see also Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977) (after Supreme Court denied certiorari from Seventh Circuit's rejection of premature *Leedom* challenge to NLRB's application of the Act to a parochial school, Court later granted certiorari and ruled in Church's favor in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), but only after Board issued final, reviewable order asserting jurisdiction).

10(k) in these circumstances, there can be no strong and clear demonstration that the Board disregarded a specific statutory mandate in issuing the 10(k) Decision.[9] Therefore, the District Court exceeded its jurisdiction in concluding that *Leedom* applied. *See Staacke*, 841 F.2d at 281, 282 ("Where, as here, the statute is capable of two plausible interpretations, the [agency's] decision to adopt one interpretation over the other cannot constitute a violation of a clear statutory mandate."); *see also Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel,* 437 F.3d 1256, 1264 (D.C. Cir. 2006) (because both parties on appeal "raised compelling arguments regarding the proper interpretation of the disputed statutory provisions," court found no violation of a clear and specific statutory directive).

C. PMA's Additional Arguments Lack Merit

There is no merit to PMA's assertion that the Court should reject the Board's asserted "new argument" explaining its Section 10(k) discretionary authority as "not presented to the District Court" (Ans. Br. at 30). The law is clear that it is "claims" that are waived, not arguments. *See United States v. Pallares-Galan,* 359 F.3d 1088, 1095 (9th Cir. 2004). A party is free to make any *argument* in support

[9] This is all that this Court need find in this *Leedom* appeal, *even if* a reviewing court were ultimately to find the Board to be incorrect on the merits. *See Vincent*, 286 F.2d at 133 (stating that in *Leedom* cases, it is "not enough that the Court of Appeals might not 'sustain the Board's view if the question were presented [ ] in an appeal under the judicial review procedures of § 10 of the Act.'"); *see also Chi. Truck Drivers v. NLRB*, 599 F.2d 816, 819 (7th Cir. 1979) (it is not sufficient that the Board may have incorrectly interpreted a provision of the Act).

of a claim on appeal, as long as the claim was raised below. *See Yee v. City of Escondido,* 503 U.S. 519, 534 (1992) (parties are not limited to the precise arguments they made below); *Weissburg v. Lancaster Sch. Dist.,* 591 F.3d 1255, 1259 n.3 (9th Cir. 2010). The Board has taken the position before the District Court that it properly concluded that it possessed jurisdiction under Section 10(k) of the Act to consider and decide the jurisdictional dispute (which PMA does not dispute, Ans. Br. at 29), and the Board has continued to assert this same claim before this Court. As this is not a new claim, the Board is permitted to advance any further argument consistent with and in support of this claim. Indeed, it would be contrary to the settled rule that a party can raise a jurisdictional defense at any time in a proceeding, even on appeal, to hold that particular arguments contesting the District Court's exercise of jurisdiction cannot be considered if not first raised below.[10] Here, the Board has appropriately challenged the District Court's exercise of jurisdiction under *Leedom* by providing fuller explanation and decisional authority setting forth the discretion granted to the Board to issue determinations pursuant to Section 10(k). (Br. at 44-46).[11]

---

[10] *See May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211 (9th Cir. 1980) ("A party may raise jurisdictional challenges any time during the proceedings.").

[11] For this reason, *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000), is distinguishable (Ans. Br. 30), where the court found a statute of limitations argument waived when it was not raised at all before the district court. *See* Fed. R. Civ. P. 8(c)(1) (statute of limitations must be affirmatively stated as a defense).

Moreover, PMA's related contention that the Court should not consider "*post hoc* arguments that were not set forth in the Section 10(k) Decision" (Ans. Br. at 29-30, 34) is misplaced in this *Leedom* appeal. This argument would only have force if this Court were reviewing the merits of the Board's Section 10(k) Decision – not where it is deciding whether there was district court jurisdiction in the first place to review and vacate an interlocutory Board decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). *Chenery* teaches that, when reviewing a final agency action, "the court is powerless to affirm the agency action" on any grounds other than those invoked by the agency. *Id.* Here, this Court is not reviewing or affirming a final agency action; rather, it is deciding whether the District Court appropriately asserted jurisdiction under *Leedom* on grounds that the Board violated a statutory mandate and PMA has no other avenue of judicial review. In this context, any prohibition against *post hoc* argument is inapplicable.[12] In short, contrary to PMA's contentions (Ans. Br. at 29-31), the

---

[12] PMA's reference to *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008) is unavailing. (Ans. Br. at 29.) *Arrington* concerns the district court's authority to consider a challenge under Section 706(2)(A) of the Administrative Procedure Act to an agency's promulgation of implementing regulations, which is not at issue here. *Id.* at 1112. In *Arrington*, the district court had statutorily-provided jurisdiction to review final agency action.

Court may consider any of the Board's arguments challenging whether either of the required elements of *Leedom* have been satisfied.[13]

II. IF THE COURT CONCLUDES THAT THIS APPEAL IS IMPACTED BY *NOEL CANNING*, THE COURT SHOULD STILL VACATE THE DISTRICT COURT'S JUDGMENT

On June 26, 2014, the Supreme Court issued its decision in *Noel Canning*, holding that three Board members who received recess appointments in January 2012 were not validly appointed. In the instant case, the Board's Section 10(k) Decision, which also rejected PMA's request to intervene (ER II 91 n.4), as well as the Board's further denial of PMA's motion for reconsideration of the Board's denial of its motion to intervene, were all issued by a panel of the Board that was not properly constituted. (ER II 82-83, 90-94.)

Noel Canning does not affect this case. As explained above, this case does not satisfy the requirements for the exercise of jurisdiction under *Leedom*. Even if the Board that issued the Section 10(k) Decision challenged in this case was not

[13] In addition, PMA's citation to the legislative history of Section 10(k) and Section 8(b)(4)(D) (Ans. Br. at 24-27) attempts to prove too much. That legislative history shows that Congress maintained the term "employees" in Section 8(b)(4)(D) and rejected a proposal to limit the provision to disputes between union "members" in response to concerns that the provision would be used to permit employers to assign work to their own non-represented employees. The cited history evidences Congress's desire to maintain *broad* authority for the Board to determine jurisdictional disputes, rather than to narrow the disputes covered. In any event, nothing in that history shows that Congress ever considered the precise question of whether Section 10(k) could be applied in circumstances where one group of employees was employed by a public entity, but an NLRA-covered employer was subject to the unlawful economic conduct.

properly constituted, it would remain the case that the jurisdictional requirements of *Leedom* have not been satisfied and that the District Court improperly exercised jurisdiction here. Moreover, the existence of the Board's quorum at the time it issued the Section 10(k) Decision here is not immune from judicial review; the ILWU, the union which lost the jurisdictional dispute in the Section 10(k) Decision, has challenged the Section 10(k) Decision on the basis of *Noel Canning* in the pending unfair labor practice proceeding. For these reasons, this is not the proper proceeding to bring a challenge under *Noel Canning*.

If, however, this Court concludes that *Noel Canning* provides a basis for this Court to dispose of this appeal without reaching the merits of the Board's arguments regarding the District Court's jurisdiction, this Court should nevertheless make clear that any such disposition leaves a properly constituted Board free to revisit the underlying Section 10(k) Decision in this case.[14] Absent clarification from this Court, the judgment of the District Court might be understood to preclude the current Board from hearing and determining the jurisdictional dispute in the first instance.

Accordingly, if this Court were to dispose of this case under *Noel Canning,* the prudent and equitable course is for this Court to vacate the oral findings and judgment below, and remand for entry of an order that permits a properly

[14] We note that in such a proceeding, the now properly constituted Board might reach a decision different from the decision now challenged.

constituted Board to revisit the Section 10(k) Decision. *See* 28 U.S.C. § 2106 (permitting courts of appeals to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances"); c*f. United States v. Munsingwear, Inc*., 340 U.S. 36, 40 (1950) (vacatur "clears the path for future relitigation of the issues between the parties" if warranted, and "eliminates a judgment, review of which was prevented through happenstance)."[15]

[15] *See also NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*,, 488 F.3d 1065, 1068 (9th Cir. 2007) (vacating district court's judgment pursuant to *Munsingwear* where decisions in other federal and state cases resolved the controversy, thus qualifying as "happenstance" that rendered the appeal moot).

CONCLUSION

For the foregoing reasons and those set forth in the Board's opening brief, the Court should vacate the District Court's judgment below and remand with directions to dismiss the case.

Respectfully submitted,

s/Nancy E. Kessler Platt

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

MARGERY E. LIEBER
Associate General Counsel

NANCY E. KESSLER PLATT
Deputy Assistant General Counsel

KEVIN P. FLANAGAN
Supervisory Attorney

DENISE F. MEINERS
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2930

August 15, 2014

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 4,213 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains ____________ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Word 2007 *(state font size and name of type style)* 14-point Times New Roman, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* ____________ with *(state number of characters per inch and name of type style)* ____________.

Signature s/Nancy E. Kessler Platt

Attorney for National Labor Relations Board

Date August 15, 2014

9th Circuit Case Number(s) 13-35818

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Aug 15, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Nancy E. Kessler Platt

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)